SUPREME COURT, U.S.

Supreme Court of the United States

October Term, 1970

NO. 827 A

HORTON & HORTON, INC., *Petitioner*

v.

VAUGHAN MARINE, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
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For The Fifth Circuit

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner Horton & Horton, Inc. (hereinafter "Horton") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on July 13, 1970, but only with respect to the respondent Vaughan Marine, Inc., (hereinafter "Vaughan") and not with respect to the judgment as to the vessel J. E. DYER and its owner Sinclair Refining Co.

OPINIONS BELOW

The opinion of the Court of Appeals (Ainsworth, C. J.) has not been reported but appears printed in the appendix to this petition.

The opinion of the District Court (Connally, D. J.) has not been reported but is printed in the appendix to this petition.

JURISDICTION

The original judgment of the Court of Appeals was entered on July 13, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. An unmanned shell barge, after a minor collision in which it received no damage, was held against the canal bank by its towing tug. It gradually filled with water. The tug twice refused offers of the Coast Guard, which was on hand with pumps and personnel, to pump out the barge, and failed to beach the barge in nearby shallow waters. Just as the barge was about to sink, a tug deckhand was ordered to go aboard it and remove an electric light cord, and he lost his life when the barge capsized before he could escape.

Was not the Court below in clear error in holding of "questionable" applicability in admiralty the long-settled principles of subsequent intervening cause and of last clear chance, and in holding as proximately causative the barge's existing leaking condition and the failure promptly to provide pumps with the two immediate causes of the

barge's sinking, the tug's two refusals to use Coast Guard pumps and personnel there available and offered, and its failure to beach the barge in nearby shallow waters?

Do not those parts of the law of proximate cause, namely of intervening and independent cause and of "the last clear chance" apply in admiralty causes just as they are applicable at law, being of perhaps lesser weight *only* in cases of ship collision?

2. Where a tug captain, realizing an unmanned barge in his care is in a sinking condition, sends a tug deckhand on the sinking barge for the trivial saving of a light cord, and the man is lost when the sinking barge capsizes before he can escape, is not the active, deliberate negligent order of the tug captain the sole, intervening proximate cause of the deckhand's death rather than a fault of equal degree with the faults of the barge owner in placing in the tug's care several days before its capsizing a barge which slowly leaked and in not immediately on request bringing a pump to the tug from some distance? Does not the established rule at law that the intentional, active negligence of a tortfeasor, immediately proximate in time to the consequential casualty, is the sole proximate cause of a loss, prevail also in admiralty?

3. A tug captain, knowing a barge was about to sink, ordered a tug deckhand to go aboard the barge, which capsized before the deckhand could escape to safety. But for the order the deckhand would not have been aboard the barge, and therefore the negligent order without doubt directly caused the deckhand's death. The tug's owner to secure its release from its own liability pays $45,000 to the deckhand's next-of-kin and in the same instrument of release takes an assignment of whatever

rights the next-of-kin might have against others, including the barge owner. The Courts below have held that the express language of *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), stating that there is no right of contribution between joint tortfeasors in admiralty except in ship collision cases, is either *dictum* or a holding that should be confined to the facts of that case, and that the assignee tortfeasor stands in the next-of-kin's shoes and so can recover for itself one-half of the settlement funds it has paid to release its own liability. Was the language in *Halcyon dictum?* Is it lawful by taking an assignment as here to circumvent the express holding in *Halcyon?*

4. Is the express language in *Halcyon* that there is (except in cases of ship collisions) in admiralty just as there was at common law no contribution between joint tortfeasors *dictum*, or a holding to be confined to cases with facts identical to that case, as the Courts below hold?

5. In admiralty causes, in cases other than those where the damages are caused by the ship's striking another vessel or some object ("collision"), does the collision mutual fault rule prevail, so that in all admiralty causes damages are to be equally divided between tortfeasors without regard to degrees of fault, as the Courts below have done in this cause?

6. Are settled rules of proximate cause more lightly adhered to in *all* admiralty causes, as the Court below holds, or only in cases of ship collisions?

STATUTES AND REGULATIONS INVOLVED

None.

STATEMENT OF THE CASE

The Circumstances of the Casualty.

Petitioner Horton was engaged in the business of dredging shell from inland waters on the Texas coast and transporting the shell by unmanned barges for sale in Houston, Texas. To tow two of its unmanned barges loaded with shell, it hired the Tug CAVALIER, owned and operated by Vaughan, and since many shell barges leak, with these barges provided a pump. R. 73, 87. (The tug had aboard a pump of its own, but this pump was at all times inoperative.) Before the tug took the two barges in tow on July 26, 1968, the barge 101 was found to be leaking, and personnel of the tug pumped out the leaking compartments. R. 71-73. Periodically on the two-day voyage the barge was pumped, until at 3 a.m. on the morning of the casualty, July 28, the Horton pump could not be started. R. 74-75, 58. The voyage was almost completed, and shortly would have been (indeed the tug's captain testified even at 8:30 the voyage could have been completed without the barge being pumped, R. 99) without damage to the barge, but for a collision with another tow, which occurred at 5 a.m. on July 28 and which did no damage to the 101. R. 75.

Both tugs shoved their barges into the channel bank, R. 46, 68-70, 78, and at about 6 a.m. the CAVALIER radiophoned Horton to send out a pump. At about the same time and later Coast Guard personnel with boats and two pumps arrived on the scene, R. 21, and the Coast Guard twice offered to pump out the barge, once at about 8:30, R. 23-24, and again at about 9:30, but the tug refused both of these offers even though it was

obvious the barge was continuing to take on water. R. 25-27.

The tug also took no steps to beach the barge in nearby shallow waters. R. 62-63.

Not a long time after the second Coast Guard offer (stated by the Coast Guard officer to have been about fifteen minutes after such offer, R. 26-67), when it was quite obvious that the barge was about to sink, the CAVALIER's captain sent a deckhand from the tug aboard the barge to remove an electric light cord (and the lights) which ran from the tug to the electric navigating lights set on the tow. R. 83. Before he could get off the barge it capsized and the deckhand was lost. R. 27, 47, 48-50, 93.

The Settlement by Vaughan of the Death Claim

Vaughan paid $45,000 in settlement to the dackhand's next-of-kin, the release agreement embodying an assignment to Vaughan of any rights of the next-of-kin against others, including Horton, with Vaughan to have sole control of any litigation. (Copy of this release agreement is printed in the appendix to this petitition.) As assignee Vaughan made claim against Horton for $85,000. When Horton answered such claim was barratrous and the case came to trial, Vaughan reduced all claims against Horton to the $45,000 amount it had itself paid to the next-of-kin, for which amount it sought indemnity from Horton. R. 124, 143.

Jurisdiction of the District Court

The District Court had jurisdiction as an admiralty court under Article 3, Section 2, Clause 1 of the Con-

stitution of the United States, 28 U.S.C. §1333, under the Limitation of Liability Act, 46 U.S.C. §§183, 184 and 185, and under Supplemental Admiralty Rule F, F.R.C.P.

The Decision of the District Court

After trial the District Court found the facts substantially as set forth above. (It dismissed the claims of fault alleged against a tank vessel whose passing coincided with the capsizing of the barge.)

It found Horton causatively at fault in providing to the tug for towage a barge which was in a leaking condition so that its buoyancy compartments required pumping, in providing to the tug a defective pump, and in later when requested by the tug to do so in failing to provide another pump in time to avoid the capsizing.

It found Vaughan through its Tug CAVALIER causatively at fault in failing to accept the use of the pumps offered by the Coast Guard, in failing to beach the barge after it became clear it was in a sinking condition, and in sending the deckhand on the barge to retrieve the light wires when the barge was in a sinking condition.

In setting out the legal basis for its conclusions, the Court entertained no doubt about its equal division of the damages from the loss of the barge but declined to follow the admiralty rule stated in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), to be that except in cases of ship collision one joint tortfeasor cannot secure contribution from another, distinguishing that case on the ground that here there was an assignment and in *Halcyon* the injured worker had no cause of action against the impleaded employer from whom contribution was sought. The Court instead preferred to

follow *Penn Tanker Co. v. United States*, 409 F.2d 514 (5 Cir. 1969), where one party had made a settlement for all damages of a decedent and was allowed to recover the part of such damages referable to an earlier injury included as a part of those for which Penn Tanker had made full payment. While recognizing the faults found occurred at different times with respect to the moment of the casualty, each was held of equal degree and hence Vaughan had paid for Horton's fault as well as its own and the damages would therefore be divided equally.

The Decision of the Court of Appeals

The Court of Appeals in substance adopted both the District Court's factual and legal conclusions:

It held that the Supreme Court's statement in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), that contribution between joint tortfeasors had not been expressly applied in non-collision admiralty cases was *dictum*, and the Supreme Court's restriction of such contribution rule in admiralty to collision cases would be considered as either *dictum* or confined to the particular facts of that case.

It then, after expressing the view that the casualty should never have occurred, held the faults of Horton continuing and concurrent with the fault of Vaughan, particularly in not furnishing the requested pump in timely fashion. The refusal by the tug, not once but twice, of the Coast Guard's proffer of pumps which were there available on the spot well before the sinking was not discussed. It rejected Horton's contention that Vaughan had the last clear chance to avert the accident, holding that ". . . in determining causation in maritime matters,

the applicability of such doctrines as last clear chance and the interruption of negligence by a subsequent intervening negligence is questionable.", adopting the view that maritime courts are less ready than the shore courts to find subsequent wrongful acts of one party break the chain of causation connecting an accident with the prior negligence of the other party.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law in a way in direct conflict with applicable decisions of this Court and of decisions of other Courts of Appeal on the same matter: It held it is questionable whether the two rules of the doctrine of proximate cause, the rules of intervening cause and of last clear chance, are applicable in admiralty causes. It then refused to apply here these two tort proximate cause rules, long held applicable both in admiralty and at law, holding that the faults of the tug, committed immediately before the casualty, in ordering the decedent upon the sinking barge, in refusing to accept and use pumps there and then available and tendered to it not once but twice by the Coast Guard, and in failing to beach the barge in nearby shallow waters, did not as active, intervening, and last clear chance faults break the causal connection between them and the remote faults of petitioner in furnishing a leaking barge and in not timely providing efficient pumps.

It is abundantly clear that this Court long ago settled the question whether common law principles of proximate cause were enforced in admiralty causes. In *The G. R.*

Booth, 171 U.S. 450 (1898), this Court so held, discussing a number of this Court's decisions in admiralty causes to support its decision, and referring approvingly to the common law case of *Milwaukee and St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469 (1877), and the language of the Court there holding that "The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury"—language which plainly states the common law rule of intervening, proximate cause.*

It is respectfully submitted that under the basic tenets of tort law that as a matter of law the immediate, proximate causes of the loss of the barge and the death of the tug's crewman were (1) the failure to beach the barge, whose leaking condition had been known since before the inception of the voyage, for two days, (2) the active fault of the tug in refusing not once but twice the offers of the Coast Guard and of its pumps to pump out the barge, and of course as to the death (3) the order of the tug master to the deckhand to go aboard the barge knowing it to be in a sinking condition.

The decision below is directly in conflict with the decision of the Court of Appeals for the Second Circuit

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* Since, as this Court has held, *Aetna Ins. Co. v. United Fruit Co.*, 304 U.S. 430 (1938), established doctrines of English maritime law are to be accorded respect here, it is English law also that there is "No Difference Between the Rules of Law and Admiralty as to what is Negligence Causing Damage", as the editors of *Marsden's Collisions at Sea*, Tenth Edition, p. 20 put it, citing two House of Lords decisions, by Lord Blackburn in *Cayzer v. Carron Co.* (1884), 9 App. Cas. 873, 880, and by Lord Dunedin in *Cork Steam Ship Company v. Commander Kiddle*, 2 Lloyds List Law Reports 505 (1920). Only in ship collision cases, where the doctrines peculiar to admiralty of mutual fault and major-minor fault are applied, is there any support for the view of the Court below that contributory fault is accorded a different weight in admiralty from at common law.

in *Chemical Transporter, Inc. v. M. Turecamo, Inc., Etc.*, 290 F.2d 496, 497 (2 Cir. 1961), a case where the tug failed to beach the barge where it was obvious the barge was in difficulty, even though the cause of its condition was not known to the tug. The tug was there held solely at fault for its sinking, under facts almost identical as to the failure to beach with those of the instant case, the Court (speaking through Judge Learned Hand) holding

> "It is indeed true that the barge was at fault as well as the tug, but the tug's fault occurred after the consequence of the barge's fault had become apparent. That is to say though we were to concede that the tug did not know of the existence of the hole at any time before the barge capsized, it had become altogether aware that for some reason the barge was in serious trouble and needed immediate attention. So far as concerned the tug's duty, it was of no importance what the cause of this was; she was bound to adapt her navigation to the emergency so presented to her, even though it was not of her own doing.
>
> "The tug was therefore guilty of negligence and was liable; and the question arises whether the case does not fall within the ordinary doctrine that damages are divided when both parties are at fault. Neither party has raised the point in the case at bar, but we will pass on it now because the answer is clear, at any rate in this court. In at least four decisions we have passed upon carelessness of a tug that caused damage to another vessel, which was herself also guilty of an earlier fault, contributing to the result; and we have held that, if the fault of the earlier vessel was obvious to the tug in time for the tug to accomodate her own navigation to the emergency, the tug alone was liable. Henry Du Bois Sons Co. v. Pennsylvania R. Co., 2 Cir., 47 F.2d

> 172; The Perseverance, 2 Cir., 63 F.2d 788; The Sanday, 2 Cir., 122 F.2d 325; Sternberg Dredging Co. v. Moran Towing & Transp. Co., 2 Cir., 196 F.2d 1002. In The Cornelius Vanderbilt, 2 Cir., 120 F.2d 766, we assimilated this situation to that of the 'last clear chance', and, indeed, that is what it is. . ."

Please see also the statement of the rule made by Circuit Judge Moore, sitting by designation, in *Arundel Corporation v. The City of Calcutta*, 172 F.Supp. 593, 596 (E.D. N.Y. 1958), in which a number of supporting cases are cited.

But one need really look no further than decisions of the Court below to find Circuit Court cases in direct conflict with the instant decision and to demonstrate how completely erroneous is the statement that it is doubtful whether the accepted rules of proximate cause ordinarily prevail in admiralty, including the last clear chance rule, which as the Court pointed out in the *Turecamo* case above is actually only a convenient tag placed upon one facet of the proximate cause rule:

In *The El Monte*, 252 F. 59 (5 Cir. 1918), cert. den. 248 U.S. 573, a case of ship collision, the Court below held

> ". . . the El Monte is to be considered solely responsible, because *it had the last clear chance* to prevent the collision, any antecedent negligence of the Clematis in the matter of a lookout astern being remote, and such as could have made no difference in the result." (Emphasis added.)

In *Crawford v. Indian Towing Co.*, 240 F.2d 308 (5 Cir. 1957), cert. den. 353 U.S. 958, another ship-collision case, the Court held

". . . The Cherokee clearly had the last clear chance to avoid the collision. The Cornelius Vanderbilt, 2 Cir., 120 F.2d 766; The Sanday, 2 Cir., 122 F.2d 325.

"Whether this be called an application of the doctrine of last clear chance or a rule of causation, makes little difference. Where, as here, an act is negligent, but is not the proximate cause of the injury, it is merely a condition. As such it is not a basis of liability. P. Dougherty Co. v. United States, 3 Cir., 207 F.2d 626."

Equally glaringly erroneous, with respect it is submitted, and in direct conflict with other of its own decisions is its holding that each were not sole proximate causes of the loss of the barge and the death of the tug crewman, the tug's faults in (1) its refusal to utilize the Coast Guard pumps and (2) ordering the deckhand aboard the sinking barge.

Failure to utilize the presently available Coast Guard pumps, which were on the spot and twice offered to the tug, and equating the refusals to use these pumps as of equal fault with petitioner's failure to provide promptly requested pumps is astonishing: Mankind's common knowledge of principles of cause and result affirms that "One bird in the hand is worth two in the bush". And the decision is in direct conflict with the decision of the Court below in *Mississippi Valley Barge Line Co. v. T. L. James and Co.*, 144 F.Supp. 662 (E.D. La. 1956), affirmed 244 F.2d 263 (5 Cir. 1957), cert. den. 355 U.S. 871.

Since the order to go upon the sinking barge was given by Vaughan's tug captain, the tort doctrine of independent intervening cause, which is of course normally referable

only to a third person's intervention, may technically not be applicable here. But how can it be reasonably argued, much less held as has the Court below, that this active, negligent order was not the immediate, proximate cause of the deckhand's death? How in reason can it be held, as the Court below does, that its decision is not in direct conflict with its own lawfully correct statement and decision in *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, 187 (5 Cir. 1969), where in conclusion the Court holds

> ". . . If the District Court should determine from the evidence that it supports a finding of active or primary negligence on the part of Delta Marine, the matter should end there and Delta Marine's claim should be dismissed. On the other hand, should the Court find that Delta Marine was only passively, vicariously, or secondarily at fault, Delta Marine should prevail on its cross-claim.",

where here the tug master's faults and inactions were each active ones, taken (and deliberately not taken) immediately prior to the barge's sinking? Please see also the older case of *American Bridge Co. v. Seeds*, 144 F. 605, 610 (8 Cir. 1906), an opinion by Judge Sanborn, where it was held a grossly negligent order of a foreman could not reasonably have been foreseen, and the decision in *Mull v. Ford Motor Company*, 368 F.2d 713 (2 Cir. 1966), where at page 717 of the opinion the accepted principle of causation applicable here is stated thus

> "Where a new force 'intervenes' to bring about a result that defendant's negligence would not otherwise have produced, the defendant is generally held for that result only where the intervening force was

foreseeable. See Harper & James, The Law of Torts §20.5 (1956); Prosser, Law of Torts §51 (3d. ed. 1964). . ."

How possibly could petitioner have foreseen Vaughan's tug captain would refuse to utilize Coast Guard pumps offered him and the use of which would have entirely avoided the casualty? How possibly could petitioner have foreseen the tug captain would have ordered a crewman on to the sinking barge to save property of trivial value?

How could the Court below lawfully deny petitioner recovery in full of its losses directly caused by the tug's intervening, active faults and hold it equally at fault for the deckhand's death?

2. The Court of Appeals has decided a federal question in conflict with applicable decisions of this Court and in conflict with decisions of its own and of other Courts of Appeal on the same matter: It has held that in causes in admiralty other than in ship collision causes, the rule of contribution between joint tortfeasors is applicable, and has required contribution between joint tortfeasors in the same way as equal division of damages is required in a mutual fault ship collision case. After holding (quite unlawfully as petitioner has above urged) that petitioner's faults were as proximately causative as those of respondent in causing the barge to capsize and the tug's deckhand to lose his life, it refused to follow this Court's decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and held petitioner liable as a joint tortfeasor to pay to respondent one-half of the sums respondent had paid to settle with the deckhand's next-of-kin and to bear one-half of its own barge losses.

The decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), that except in cases of a collision of a ship admiralty follows the common-law rule that one joint tortfeasor cannot recover contribution from another has of course (as was their duty, *The Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819)) been followed by the Courts of Appeal, one of these cases being the recent decision of the Court of Appeals for the Second Circuit in *McLaughlin v. Trelleborgs Angfartygs A/B*, 408 F.2d 1334 (2 Cir. 1969), cert. den. 395 U.S. 946.

Until its decision in the instant case the Court of Appeals below has itself followed without comment the *Halcyon* decision. In *Hartford Accident & Indemnity Co. v. Gulf Refining Co.*, 230 F.2d 346 (5 Cir. 1956), at page 354, it followed the *Halcyon* decision in holding

> ". . . Moreover, Gulf has no right to contribution from Black Warrior, its joint tortfeasor in a non-collision maritime injury case. Halcyon Lines v. Haenn Ship, etc., Corp., 342 U.S. 282, 72 S.Ct. 297, 96 L.Ed. 318."

In stating its reasons for not in this instant case following the decision of this Court in *Halcyon*, the Court below first attempts to distinguish this case from *Halcyon* on the ground that in *Halcyon* the shipyard worker had no cause of action against his employer, which is of course not true here. But this ground for the holding is in direct conflict with this Court's decision in *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404 (1969), where the employee had no direct cause of action against

his employer and in which, at page 417, this Court's holding in *Halcyon* was reaffirmed.

The refusal of the Court below to follow *Halcyon* was then put upon the grounds that this Court's *Halcyon* holding on contribution was either *dictum* or should be confined to like facts to those of *Halcyon,* the Court below adopting as its own suggestions to that effect made by the author of the law review article entitled "Contribution and Division of Damages in Admiralty and Maritime Cases", 45 California Law Review pp. 304, et seq. While this article cites many cases on division of damages in admiralty causes, it cites no decision by this Court which affirms, as this Court states in *Halcyon* there were none, that in admiralty other than in ship collision cases contribution between joint tortfeasors has been required. (The author acknowledges, moreover, that this rule of contribution has become the law in England only by reason of recent English statutory enactments, in 1933 and 1935.)

Petitioner with respect submits as conclusive proof that unless this Court corrects the decision below by allowance of this application and review of the instant decision that *Halcyon* will not be followed in the Fifth Circuit, is the recent decision of the Court of Appeals in *Watz v. Zapata Off-Shore Company,* not yet reported but decided on September 1, 1970, No. 27974 on the Court's docket, in which (on page 44 of the opinion) the Court held

> "We turn finally to the contribution and indemnity claim of Eaton against Campbell. Since we have concluded that both Eaton and Campbell were negligent, we have a case of joint tortfeasors. This Court has already held that the apparent prohibition of

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation, 1952, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318, against contribution between joint tortfeasors in admiralty does not apply to a situation where Watz as plaintiff could have proceeded against both Eaton and Campbell and could have recovered damages from both. Horton & Horton, Inc. v. T/S J. E. Dyer, 5 Cir. 1970, F.2d [No. 28,706, July 13, 1970]. Halcyon is distinguished by the fact that there a statute precluded recovery by the plaintiff against the impleaded party.[23]"

"[23] To the extent that Hartford Accident & Indemnity Co. v. Gulf Refining Co., 5 Cir. 1956, 230 F.2d 346, 354, cert. denied, 352 U.S. 832, is inconsistent with this result, we must treat it as controlled by Horton & Horton."

Here the Court below has (a) refused to follow this Court's clear decision in *Halcyon*, (b) has decided in direct conflict with numerous decisions of other Courts of Appeal that the holding in *Halcyon* is mere *dictum*, and (c) that the express language in *Halcyon* is distinguishable on its facts from the true rule of contribution, on that ground directly in conflict with this Court's decision in *Burnside*, and (d) has decided in the instant case and again in another case decided since the instant one that it will neither follow its own prior decision in the *Hartford Accident & Indemnity Co. v. Gulf Refining Co.* case nor the *Halcyon* decision.

CONCLUSION

The Court of Appeals has therefore here decided it is the law in the Fifth Circuit that in all admiralty causes joint tortfeasors shall contribute in equal degree, and that

in all admiralty causes the generally accepted rules of law governing the determination of the proximate cause of a casualty will not be followed. Both of these determinations are in direct conflict with decisions of this Court and of other Courts of Appeal on the same matters, on important questions of law.

A writ of certiorari should be granted to review the decision of the United States Court of Appeals herein.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28706

HORTON & HORTON, INC.,
Plaintiff-Appellant-Cross Appellee,

versus

T/S J. E. DYER, Her Engines, Tackle, etc., and
COMMERCE TANKERS COMPANY, INC.,
Her Owner, etc., ET AL.,
Defendants-Appellees-Cross Appellants.

Appeals from the United States District Court for the Southern District of Texas

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(July 13, 1970)

Before BELL, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: This admiralty matter evolved from a collision between vessels in the Houston (Texas) Ship Channel resulting shortly thereafter in a casualty which is the subject of the litigation. In the early morning of July 28, 1968, the tug CAVALIER, owned by Vaughan Marine, Inc., was proceeding up the Channel pushing ahead the loaded shell barges H&H 101 and

H&H 139, owned by Horton & Horton, Inc., when the CAVALIER became involved in a collision with the tow of the tug C. R. CLEMENTS, owned by Republic Marine Carriers, Inc.[1] Following the collision the crew of the tug CAVALIER beached both of the H&H barges on the mud flats of the Channel. The H&H 101 had been leaking prior to the collision, necessitating pumping by the crew, but several hours before the accident the barge required pumping again but the pump furnished by Horton could not be started. After the collision a radio call was made by the captain of the CAVALIER to Horton's nearby office on the Channel requesting that Horton send an additional pump. The request went unheeded. Later the U. S. Coast Guard at the scene offered to pump out the H&H 101 but the CAVALIER, anticipating assistance from Horton, declined the offer. While the barges were lying on the strand, a tankship, the J. E. DYER, owned by Sinclair Refining Company, passed the site, apparently without incident. Shortly thereafter the H&H 101 capsized, spilling its load of shells into the water, and Joseph M. Fontenot, a deckhand from the tug CAVALIER, who had been sent aboard the sinking barge H&H 1(to retrieve the tug's running lights and electric cord, was thrown into the Channel and drowned.

Vaughan Marine, Inc., employer of the deceased deckhand, disposed of a claim for damages by Fontenot's widow and children for the sum of $45,000. Under the written settlement agreement the Fontenot heirs granted to Vaughan Marine, Inc. a full release from all liability growing out of the accident, specifically reserved their

1. Prior to the trial, Republic Marine Carriers, Inc., owner of the tug which had in tow the colliding barge, settled all claims against it growing out of the collision and was dismissed from the suit.

rights against all other parties, and assigned and subrogated those reserved rights to Vaughan Marine, Inc.

Horton & Horton, Inc. initiated these proceedings by filing suit against the T/S J. E. DYER and her owners, alleging that the damage to the H&H 101 and its cargo and the death of Fontenot were caused by its wave wash. Vaughan Marine, Inc. and Horton & Horton, Inc. subsequently filed complaints for exoneration or limitation of liability. Vaughan counterclaimed as owner of the CAVALIER and as assignee of the Fontenot heirs' claim. All of these causes were consolidated for trial.[2] The parties stipulated that the sum of $45,000 paid by Vaughan Marine, Inc. to the Fontenot heirs was fair and reasonable; and that the sum of $10,975 constituted the total damages suffered by Horton occasioned by the capsizing of the H&H 101 and the loss of its cargo.

The District Court in its findings and conclusions ascribed no fault to the tankship J. E. DYER and dismissed the complaint against it and its owners. We are in agreement with this finding, there being no convincing evidence of negligence against the J. E. DYER, and thus address ourselves to the relative claims existing between the two remaining parties, Vaughan and Horton.

The District Court found that the barge H&H 101 was unseaworthy because of various leaks, holes and breaches in her hull, some of long standing, that the said unseaworthiness was within the privity and knowledge of Horton, that Horton breached its warranty of seaworthi-

2. At the trial counsel withdrew the claim of Vaughan Marine, Inc. for limitation inasmuch as its total potential liability exposure was less than the value of the tug CAVALIER at the termination of the voyage.

ness owed to Vaughan and the tug CAVALIER, and that this unseaworthiness was a proximate cause of the capsizing of the barge H&H 101 and the death of Fontenot. The District Court also found Horton negligent in failing to supply adequate pumps, in failing to respond to the master of the tug CAVALIER when he called for a pump after the collision, and that this negligence was a proximate cause of the capsizing of the H&H 101 and the death of Fontenot.

The District Court also found that the master and crew of the tug CAVALIER were negligent in failing to accept the use of pumps offered by the Coast Guard and in sending Fontenot aboard the H&H 101, which negligence was a proximate cause of the capsizing of the H&H 101 and the death of Fontenot.

Having decided that the death of Fontenot and the damages occasioned to the barge H&H 101 and its cargo were caused by the mutual fault of Horton and Vaughan, the Trial Judge divided Horton's damages of $10,975 and Vaughan's damages of $45,000 equally between the two parties. We affirm.

The parties do not seriously contest the factual determinations made by the Trial Court. Vaughan's brief concludes that the Trial Court should "in all things" be affirmed.[3] Horton, whose barge and cargo loss amounts

3. Vaughan argues that despite the fact that the Court had before it all of the parties who under any circumstances could have been at fault, Horton failed to make a claim against Vaughan for the damages occasioned to Fontenot's assignee, thereby precluding it from recovering in these proceedings. We find these objections to the adequacy of the pleadings to be without merit. The consolidated pleadings were sufficiently broad to enable the Court under its general equitable power to fashion a remedy which would do justice to the parties.

to considerably less than the amount paid by Vaughan in settlement, contends that the Court erred in allowing contribution to Vaughan in connection with the $45,000 settlement made by Vaughan to Fontenot's survivors, citing *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277 (1952), in support of its contention.

In *Halcyon*, a ship repair employee was injured aboard Halcyon's vessel while engaged in making repairs. He sued the shipowner for damages for his injury, alleging negligence and unseaworthiness. As a worker covered by the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950), he was prohibited from also suing his employer Haenn. The shipowner impleaded the employer as a joint tortfeasor, seeking contribution which the Supreme Court denied, holding that contribution had not been authorized by Congress under these circumstances.[4] By dictum the Court said that contribution had never been expressly applied in non-collision cases. The District Court, while expressing slight misgivings,[5] correctly distinguished the instant case from *Halcyon* as follows:

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4. Later the Supreme Court in Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp., 350 U.S. 124, 76 S.Ct. 232 (1956), provided a remedy over by the shipowner against the employer, under a theory of indemnity.

5. The District Judge said: "In making disposition of the foregoing matter, the only question which gives me any pause is that of the division of the damages. Despite the findings of mutual fault on the part of the Barge H & H 101 and of the Tug CAVALIER (which, in my judgment, is indicated by a clear preponderance of the evidence), nevertheless it is contended by Horton & Horton, as owner of the 101 . . . that . . . in no event should it share any portion of the CAVALIER's loss (due to the settlement for Fontenot's death)."

> "Here we have a settlement by the CAVALIER interests with the injured party, and an assignment of the plaintiff's cause of action against the second wrongdoer. This was not true in the cited authority as there was no cause of action available to the injured shipyard worker against his own employer, the impleaded defendant against whom contribution was sought."

The District Judge, therefore, decided that the holding in *Halcyon* was limited to cases where the joint tort-feasor against whom contribution was sought was immune from tort liability by statute.

Regardless of whether we consider the restrictive language of *Halcyon* as dictum or determine that it should be confined to its own particular facts,[6] that is, as barring division of damages among joint tort-feasors, one of which is statutorily immune from tort liability, we agree with the District Court that the *Halcyon* doctrine is not applicable here. Vaughan stands in the place of the Fontenot heirs by virtue of the assignment, and is asserting a cause of action for damages due it resulting from the death of Fontenot. Unlike the injured harbor worker in *Halcyon* who, by virtue of the limited tort liability provisions of the Harbor Workers' Act, was relegated to an action against one tort-feasor, the Fontenot heirs had the option, if they desired, of proceeding against both tort-feasors responsible for the death of the deckhand.

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6. See, for example, the discussion in 45 Calif. L. Rev. 304, 345 (1957), *Contribution and Division of Damages in Admiralty and Maritime Cases,* in which the author after an extensive documented history and analysis of the equitable principles of contribution between mutual wrongdoers in admiralty concludes that the language in *Halcyon* is incorrect dictum, to be limited to the situation there presented.

Had the heirs exercised their right to sue Vaughan and Horton, both defendants would have been responsible in damages under circumstances not statutorily precluded as in *Halcyon*. See *Luigi Serra v. Francesco*, 2 Cir., 1967, 379 F.2d 540; *D/S Ove Skou v. Herbert*, 5 Cir., 1966, 365 F.2d 341; *Penn Tanker Company v. United States*, 5 Cir., 1969, 409 F.2d 514.

The unfortunate casualty was one which should not have happened, considering the propitious circumstances which surrounded it—good weather, day-light hours, and no sudden emergency requiring instantaneous decisions. In short, it was an accident which would not have happened except for the concurring negligence of Vaughan and Horton. We find no error in the Court's holding that the negligence of both parties and the unseaworthiness of the H&H 101 were proximate causes of the capsizing of the barge and the death of Fontenot. In so holding, we have carefully considered the twofold argument of Horton in which it is urged first that conceding its negligence and the unseaworthiness of the barge, nevertheless neither circumstance can legally constitute a proximate cause of Fontenot's death.

Horton contends that the deterioration of the barge was merely a pre-existing condition and not a proximate cause of the accident in the face of the direct intervention of the grossly negligent act of the CAVALIER'S Captain in ordering Fontenot to go aboard the vessel knowing that sinking was imminent. But for that grossly negligent order, Horton further contends, the death of Fontenot would not have occurred, and consequently the negligent act and not the pre-existing condition was the proximate cause of the accident; that in any event Vaughan had the

last clear chance. With respect to the damage occasioned to the barge and its cargo, Horton argues the defective condition of the barge was known to the tug's captain and the tug cannot be absolved from its duty to take whatever steps were necessary and available to prevent further damage to the tow. This is not a case, however, where the unseaworthiness of a barge, which is obvious to the tug, is brought into active play only because of the super-imposed subsequent negligence of the tug. *See, e. g., Mississippi Valley Barge Line Co. v. T. L. James & Co.*, E.D. La. 1956, 144 F. Supp. 662, aff'd 5 Cir., 1957, 244 F.2d 263; *Southwestern Sugar & Molasses Co. v. River Term. Corp.*, E.D. La., 1957, 153 F. Supp. 923; *Chemical Transporter, Inc. v. M. Turecamo, Inc., Etc.*, 2 Cir., 1961, 290 F.2d 496. The record indicates much more than a pre-existing defective barge to which the tug should have accommodated herself. In addition to the unseaworthiness of the H&H 101 as a causative factor of the capsizing, the District Court found significantly that Horton's negligence in subsequently failing to provide pumps after being notified of the dire and immediate need for them was a proximate cause of the sinking and death. Thus the fault of Horton did not come to rest only to be revived by Vaughan's subsequent negligence. Horton's dereliction of duty was continuous from the time assistance was requested. Approximately four hours elapsed between the call for help and the subsequent sinking of the barge. We agree with the District Court that had a pump been furnished in timely fashion after this call, it is likely that the casualty would have been averted. Moreover, in determining causation in maritime matters, the applicability of such doctrines as last clear chance and the interruption of negligence by a subsequent

intervening negligence is questionable. "[T]he maritime court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with the prior negligence of the other party." Gilmore and Black, *The Law of Admiralty*, p. 404 (1957). *See also Commercial Transport Corp. v. Martin Oil Service, Inc.*, 7 Cir., 1967, 374 F.2d 813, 817. The present case is unlike *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co.*, 5 Cir., 1967, 410 F.2d 178, which was remanded for determination of whether a cross-claimant's actions constituted passive, vicarious or secondary negligence, whereas here the District Court has determined the mutual fault of both parties as being direct proximate causes of the casualty. In his written opinion the District Judge has adequately set forth the facts which establish the basis of his findings after having had the opportunity to hear and observe the witnesses, appraise their credibility, and weigh any conflicting inferences. Unless such findings are clearly erroneous they will not be overturned. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6 (1954); *Chaney v. City of Galveston*, 5 Cir., 1966, 368 F.2d 774; *Grigsby v. Coastal Marine Service of Texas, Inc.*, 5 Cir., 1969, 412 F.2d 1011. Questions of negligence, unseaworthiness and proximate cause are to be determined by the trier of fact and as such are subject to the clearly erroneous rule. *Southern Stevedoring & Contract. Co. v. Hellenic Lines, Ltd.*, 5 Cir., 1968, 388 F.2d 267, 270; *M/V Ena K v. Monplaisir*, 5 Cir., 1968, 391 F.2d 277, 278; *E. D. Stephens v. Osaka Mercantile Steamship Company*, 5 Cir., 1964, 328 F.2d 604, 605. We are unable to say that the Court's findings and conclusions are erroneous. To the contrary, we agree with them.

AFFIRMED.

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HORTON & HORTON, INC.,
vs. Plaintiff
T/S J. E. DYER, HER ENGINES, TACKLE, APPAREL ETC., AND COMMERCE TANKERS CO., INC., HER OWNER,
Defendants

C. A. NO. 68-H-657
(CONSOLIDATED)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY STATEMENT

On July 26, 1968, the Tug CAVALIER picked up Barges H&H 101 and H&H 139 loaded with shell from alongside the Dredge GEORGE F. in San Antonio Bay bound for Horton & Horton, Inc.'s shell dock located at Cotton Patch Bayou just off the Houston Ship Channel. During the early morning hours of July 28, 1968, the Tug CAVALIER was pushing the Barges H&H 101 and H&H 139 ahead which said Barges were made up stern to stern in tandem with the Barge H&H 139 being the lead Barge of said tow and the Barge H&H 101 being the face Barge. At approximately 4:50 a.m. while the Tug CAVALIER and her tow were navigating upstream in the Houston Ship Channel toward Cotton Patch Bayou, just downstream from the Lynchburg Ferry Crossing she came

into collision with the Barge CBC 192 which was in tow of the Tug C. R. CLEMENTS down bound in the Houston Ship Channel. The Barge CBC 192 and the Barge H&H 139 were damaged by the collision but the Barge H&H 101 was undamaged as a result of the said collision. After the lead Barges of the tows were disengaged, the Tug CAVALIER beached her tow on the mud flats on the south bank of the Houston Ship Channel just below the San Jacinto Battleground. While the Barges H&H 139 and H&H 101 were lying on the strand, the Barge H&H 101 capsized precipitating her load of shell into the Houston Ship Channel. At the time of the capsizing of the Barge H&H 101, Joseph M. Fontenot, deckhand aboard the Tug CAVALIER, was aboard the Barge H&H 101 and as result of the said capsizing was precipitated into the waters of the Houston Ship Channel where he lost his life.

Shortly before the capsizing as aforementioned which occurred at approximately 9:50 a.m. the Tankship J. E. DYER was observed passing the site of the strand, upbound in the Houston Ship Channel.

For a consideration of FORTY-FIVE THOUSAND AND NO/100 DOLLARS ($45,000.00) paid by Vaughan Marine, Inc. to Patricia Bergeron Fontenot, the widow of Joseph M. Fontenot, in her individual capacity and as Tutrix of Mark Evans Fontenot and Phillip Troy Fontenot, the minor children of the marriage between Patricia Bergeron Fontenot and Joseph M. Fontenot, Vaughan Marine, Inc. disposed of the said widow and minor children's claim against Vaughan Marine, Inc. and the Tug CAVALIER and took a partial release and assignment and indemnity agreement from the said Patricia Bergeron

Fontenot, which said assignment assigned to Vaughan Marine, Inc. all causes of action against any and all parties in any way responsible for the death of Joseph M. Fontenot and especially reserved to the assignee the cause of action against Horton & Horton, Inc., and the Barges H&H 101 and H&H 139. It has been stipulated among the parties to this cause that the FORTY-FIVE THOUSAND AND NO/100 DOLLARS ($45,000.00) paid to Patricia Bergeron Fontenot in her individual and representative capacities in exchange for the assignment of her claim in those capacities was fair and reasonable. Horton & Horton, Inc.'s total damages occasioned by the capsizing of the Barge H&H 101 are stipulated as $10,975.00.

THE LITIGATION

Suit was commenced by Horton & Horton, Inc. against the T/S J. E. DYER, her engines, tackle, etc., Commerce Tankers Co., Inc., and Sinclair Refining Company alleging that damage to the Barge H&H 101, loss of her cargo, and the death of Joseph M. Fontenot was caused by the wake and/or suction created by the negligent passage of the said tankship. This cause of action was carried on the docket of this Court as C. A. No. 68-H-657. Shortly thereafter Vaughan Marine, Inc., as owner of the Tug CAVALIER filed its Complaint praying for exoneration from or limitation of liability, etc. which said cause of action was carried on the docket of this Court as C.A. No. 68-H-659. Thereinafter Horton & Horton, Inc. as owner of the Barge H&H 101 filed its Complaint praying for exoneration from or limitation of liability for the death of Joseph Fontenot, which said action was carried on the docket of this Court as C. A. No. 69-H-29. Subsequently the said causes were consolidated under the

earliest number and style and carried as C. A. 68-H-657 Consolidated, Horton & Horton, Inc., etc. vs. T/S J. E. DYER, et al. Prior to the trial of the cause, Republic Marine Carriers, Inc. as owner of the Tug C. R. CLEMENTS settled the claim of Canal Barge Line for damages occasioned to the Barge CBC 192 and the claim of Horton & Horton, Inc. for damages occasioned to the Barge H&H 139 and the said parties and vessels were dismissed from the litigation. The case proceeded to trial on the issues raised among Horton & Horton, Inc., Vaughan Marine, Inc., Sinclair Refining Company, the Tug CAVALIER, Barge H&H 101 and the Tankship J. E. DYER on May 26, 1969, and the evidence was closed and the case was argued on May 27, 1969.

FINDINGS OF FACT

1. Vaughan Marine, Inc. is a private corporation organized and existing under and by virtue of the laws of Louisiana, having its principal office and place of business in Abbeville, Louisiana.

2. Horton & Horton, Inc. is a private corporation organized and existing under and by virtue of the laws of the State of Texas, having its principal office and place of business in Houston, Texas.

3. Sinclair Refining Company was a corporation organized and existing under and virtue of the laws of the State of Delaware having its principal office and place of business in New York City, New York.

4. On the time and date in question the Tug CAVALIER was owned and operated by Vaughan Marine, Inc.

5. On the time and date in question the Tankship J. E. DYER was operated by Sinclair Refining Company.

6. On the time and date in question the Barges H&H 101 and H&H 139 were owned by Horton & Horton, Inc.

7. The Barge H&H 101 was unseaworthy since she was not suitable and fit for carrying her shell cargo from San Antonio Bay to Horton & Horton, Inc.'s terminal on the Houston Ship Channel because of various leaks, holes and breaches in her hull that resulted in her taking on large quantities of water into her buoyancy compartments eventually causing her to partially sink and capsize. A number of these holes and leaks were the result of wear and corrosion to her hull plates and were conditions of long standing.

8. The wasted and deteriorated condition of the Barge H&H 101 was discoverable by the exercise of ordinary care on the part of Horton & Horton, Inc., and Horton & Horton, Inc. knew or should have known of her unseaworthy condition prior to the commencement of the voyage upon which this casualty occurred. The said unseaworthiness existed and was within the privity and knowledge of Horton & Horton, Inc.

9. Horton & Horton, Inc. furnished to the Tug CAVALIER one gasoline powered portable pump for the purposes of pumping out the Barges H&H 101 and H&H 139 as the need arose on the voyage made the basis of this cause. This pump was defective and would not operate prior to the collision and prior to the capsizing when it became necessary to pump water from the hull of the Barge H&H 101 to prevent her from capsizing and sinking.

10. Had the pump supplied by Horton & Horton not been defective, the crew of the Tug CAVALIER would have been able to have pumped her buoyancy compartments and prevented her filling with water and capsizing.

11. Horton & Horton, Inc. was negligent in failing to furnish adequate pumps when it knew or should have known that the Barge H&H 101 was in such an unseaworthy condition that she required frequent pumping to keep her afloat on her anticipated voyage to Cotton Patch Bayou. Under these conditions at least two pumps, in good operating condition, should have been furnished to the Tug CAVALIER.

12. At about 6:00 a.m. shortly after the collision, Horton & Horton, Inc.'s Cotton Patch Bayou Office was notified by the master of the Tug CAVALIER of the fact that the Barge H&H 101 was filling with water and was in dire need of a pump. Horton & Horton, Inc. was negligent in failing to supply a pump before the capsizing and its failure so to do was a cause of the capsizing.

13. The mate or relief captain of the Tug CAVALIER was at fault in failing to avail himself of pumps offered by the United States Coast Guard prior to the capsizing.

14. The Tug CAVALIER was at fault in failing to disengage the Barges H&H 101 and H&H 139 and make an effort to push the Barge H&H 101 further inshore or into shallower water after it became clear that she was in a sinking condition.

15. The master of the Tug CAVALIER was at fault in sending Joseph M. Fontenot aboard the Barge H&H 101 to retrieve the light wires at such a time when the Barge H&H 101 was in a sinking condition.

16. There was no substantial evidence of any probative value introduced at the trial of this cause tending to show that the Tankship J. E. DYER was at fault. She was moving at a minimal speed past the site of the casualty having slowed her speed long prior to reaching the scene and passed in a safe and prudent manner.

CONCLUSIONS OF LAW

1. This Court is vested with jurisdiction of these proceedings, in admiralty.

2. The Barge H&H 101 was unseaworthy at the inception of the voyage which said unseaworthiness existed within the privity and knowledge of Horton & Horton, Inc. Her unseaworthiness proximately caused her capsizing and the death of Joseph M. Fontenot.

3. Horton & Horton, Inc. is not entitled to exoneration from or limitation of its liability with respect to the claims made against it as owner of the Barge H&H 101.

4. Horton & Horton, Inc. breached its warranty of seaworthiness of the Barge H&H 101 to the Tug CAVALIER and Vaughan Marine, Inc., which said breach proximately caused the said barge's capsizing and the death of Joseph M. Fontenot.

5. Horton & Horton, Inc.'s negligence in failing to respond to the master of the Tug CAVALIER'S call for a pump at 6:00 a.m. was a proximate cause of the capsizing of the Barge H&H 101 and the death of Joseph M. Fontenot.

6. Horton & Horton Inc.'s negligent failure to supply pumps adequate in either number or operating condition

was a proximate cause of the capsizing of the Barge H&H 101 and the death of Joseph M. Fontenot.

7. The negligence of the master and crew of the Tug CAVALIER in failing to accept the use of pumps offered by the Coast Guard was a proximate cause of the capsizing of the Barge H&H 101 and the death of Joseph M. Fontenot.

8. The negligence of the master of the Tug CAVALIER in sending Joseph M. Fontenot aboard the Barge H&H 101 was a proximate cause of his death.

9. Damages occasioned to the Barge H&H 101 and loss of its cargo are in the stipulated amount of $10,975.00. Vaughan Marine, Inc.'s damages as assignee of the cause of action of Patricia Bergeron Fontenot in her individual and representative capacities are $45,000.00.

10. At the time of the trial the total potential liability exposure of Vaughan Marine, Inc. is less than the value of the Tug CAVALIER at the termination of the voyage upon which the casualty occurred and consequently its cause for limitation for liability has become moot.

11. Since the capsizing of the Barge H&H 101, damages occasioned to its hull, loss of its cargo, and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the Barge H&H 101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc., in equal proportions, damages should be divided evenly. Vaughan Marine, Inc. as owner of the Tug CAVALIER and as assignee of the claim of Patricia Bergeron Fontenot should recover from Horton & Horton, Inc. the sum of $17,012.50 plus 50% of its costs.

In making disposition of the foregoing matter, the only question which gives me any pause is that of the division of the damages. Despite the findings of mutual fault on the part of the Barge H&H 101 and of the Tug CAVALIER (which, in my judgment, is indicated by a clear preponderance of the evidence), nevertheless it is contended by Horton & Horton, as owner of the 101, (a) that Horton & Horton should recover its *full* damage from the CAVALIER, or alternatively (b) that it should recover one-half of its damage; but in no event should it share any portion of the CAVALIER's loss (due to the settlement for Fontenot's death). In support of this position in its brief it states:

> "It is fundamental admiralty law that one tort-feasor can not recover from another tort-feasor any part of a settlement payment it has made to a plaintiff." (Citing Halcyon Lines v. Haenn Ship Ceiling Corp., 342 U.S. 282.)

I do not read this authority as supporting such a broad statement of the rule. This was a case in which a shipyard worker was injured while repairing a vessel and sought recovery against the vessel for his injuries. The vessel sought to implead his employer, which, it was alleged, was likewise negligent. The court denied this effort to recover contribution. The present case differs from the cited authority in this important particular. Here we have a settlement by the CAVALIER interests with the injured party, and an assignment of the plaintiff's cause of action against the second wrongdoer. This was not true in the cited authority as there was no cause of action available to the injured shipyard worker against his own employer,

the impleaded defendant against whom contribution was sought.

Closer in point of fact to the present case is the recent opinion of the Fifth Circuit in *Penn Tanker Co. v. United States,* 409 F.2d 514 (1969). In *Penn* a seaman received certain injury to his eyes allegedly due to fault on the part of the vessel. Sometime thereafter in securing treatment at a Public Health Service facility, and as result of negligent and improper medical care by a physician employed by the United States Government, he completely lost the sight of one eye, and at a later date committed suicide. The vessel effected a settlement covering any and all damages sustained, and an assignment of whatever cause of action existed against the Government. The vessel asserted this liability against the Government in the reported case, and recovery was allowed. In the course of the opinion the Court stated:

> "Alternatively, when Penn paid Hodges damages for which it was liable but which were caused by the Government's aggravation of the eye injury, it became an assignee by operation of law . . . and stood in Hodges' shoes to prosecute his claim against the Government."

Penn differs from the present case only in that the damages suffered by the injured party resulted from negligent conduct of the two wrongdoers at different times and under different circumstances; and it might more readily be determined what part of the total damage flowed from each negligent act.

In the present case both the owners of the Barge 101 and of the CAVALIER were negligent, and at different

times, although the negligence was manifest in a single casualty which occurred at a given moment. The negligence and fault of the two, in my judgment, was of equal gravity and degree. In effecting the full settlement with Fontenot's beneficiaries for damages resulting in substantial part from the fault of the Barge 101 and her owners and holding a valid assignment thereof (irrespective of whether contribution would arise as a matter of law), the CAVALIER "stood in Fontenot's shoes to prosecute his claim" against the 101. Hence I consider the damages should be divided equally.

Finally it is contended on behalf of Horton & Horton that the settlement, and the securing of the assignment, was a violation of the criminal law of Texas (citing the Barratry Statute, Texas Penal Code Art. 430). The settlement by one tort-feasor with the injured party, and the securing of an assignment of his cause of action against the other, is neither criminal nor against public policy in this state. The leading case is *Bradshaw v. Baylor University*, 84 S.W.2d 703 (Comm. App. 1935). Additionally, the *Penn* case cited above gives no indication of any illegality or public policy consideration under these circumstances.

Counsel for the Tug CAVALIER will submit decree in conformity with the foregoing at an early date.

Done at Houston, Texas this 12th day of August, 1969.

BEN C. CONNALLY
United States District Judge

RECEIPT, RELEASE, ASSIGNMENT AND INDEMNITY AGREEMENT

BE IT KNOWN that on this 23rd day of September, 1968, before me, the undersigned authority, and in the presence of the undersigned witnesses, personally came and appeared PATRICIA BERGERON FONTENOT, widow of Joseph M. Fontenot, of full age and a resident of Evangeline Parish, duly qualified administratrix of the Estate of Joseph M. Fontenot and duly qualified and confirmed tutrix of the minor children, Mark Evans Fontenot and Philip Troy Fontenot, who, after being duly sworn, did depose and say that:

Joseph M. Fontenot was killed on July 28, 1968, in the waters of the Houston Ship Channel, within the territorial confines of the State of Texas, while employed by Vaughan Marine, Inc., as a member of the crew of the Tug CAVALIER; that surviving my husband, Joseph M. Fontenot, were myself and two minor children, Mark Evans Fontenot and Philip Troy Fontenot. Agnes McCauley Fontenot, mother of Joseph M. Fontenot, also survived the death of my husband but was not dependent to any extent upon my husband for support.

I, Patricia Bergeron Fontenot, individually, as administratrix of the Estate of Joseph M. Fontenot, and as tutrix of the minor children, Mark Evans Fontenot and Philip Troy Fontenot, acknowledge receipt of the sum of Forty-five Thousand ($45,000.00) Dollars paid by the Tug CAVALIER, Vaughan Marine, Inc., and their respective underwriters and representatives.

I, Patricia Bergeron Fontenot, individually, as administratrix of the Estate of Joseph M. Fontenot, and as

tutrix of the minor children, Mark Evans Fontenot and Philip Troy Fontenot, and on behalf of my heirs, successors, administrators and assigns, in consideration of the payment of the above sum, do by these presents grant unto the Tug CAVALIER, Vaughan Marine, Inc., their respective underwriters, directors, managers, employees, agents, representatives, vessels and crews (hereinafter sometimes referred to as "Released Parties") a full and final release of and from any and all liability on account of or in any manner related to the employment of my husband by Vaughan Marine, Inc., aboard the Tug CAVALIER, or in any manner related to or arising out of the death of my husband, Joseph M. Fontenot, which occurred on or about July 28, 1968, when the Barge H&H 101 capsized while he was aboard her causing him to die beneath the waters of the Houston Ship Channel, which said event occurred shortly after the collision between the Tug CAVALIER and tow and the Tug C. R. CLEMENTS and tow.

The above release encompasses, without limitation, any and all past, present or future claims, actions, demands, rights, causes of action and rights of action whatsoever, known or unknown, anticipated or unanticipated, to which I may be or might be entitled, individually, or in my representative capacity, as administratrix of the Estate of Joseph M. Fontenot or as tutrix of the minor children, Mark Evans Fontenot and Philip Troy Fontenot, or otherwise, in any way arising out of or resulting from the death of Joseph M. Fontenot as aforesaid, including, but not limited to, all rights under the laws of the State of Louisiana and Texas, the Longshoremen's and Harbor Workers' Compensation Act, the Jones Act, the General Maritime Law, for maintenance and cure,

in law, in equity or in admiralty, whether growing out of tort, contract, compensation or otherwise and further including without limitation any claim for wrongful death, for pain and suffering, pecuniary loss or any other claim or claims whatsoever.

It is distinctly understood and agreed that all rights of Patricia Bergeron Fontenot, individually, as administratrix of the Estate of Joseph M. Fontenot, and as tutrix of the minor children, Mark Evans Fontenot and Philip Troy Fontenot, are specifically reserved against any and all parties not specifically released herein and are especially reserved against the following parties: Horton & Horton, Inc., Republic Marine Carriers, Inc., Canal Barge Co., Inc., the United States of America and any entity or subdivision thereof, Sinclair Refining Company, their respective successors, legal representatives and underwriters, and the Barge H & H 101, Barge H & H 139, Tug C. R. CLEMENTS, Barge CBC 192, and the SS J. E. DYER, their engines, tackle, appurtenances, owners, operators and underwriters and any and all other person, firms, corporations or individuals who might be liable for any and all rights and causes of action which appearer may have against the said parties for the wrongful death of Joseph M. Fontenot under all applicable law or laws.

I, Patricia Bergeron Fontenot, individually and as administratrix of the Estate of Joseph M. Fontenot and as tutrix of the minor children, Mark Evans Fontenot and Philip Troy Fontenot, in further consideration of said payment by "Released Parties" hereby sell, assign and subrogate to Vaughan Marine, Inc., and its underwriters all of my rights, titles, interest, claims, causes of action and rights of action whatsoever which I may now have

or hereafter acquire against Horton & Horton, Inc., Republic Marine Carriers, Inc., Canal Barge Co., Inc., the United States of America and any entity or subdivision thereof, Sinclair Refining Company, their respective successors, legal representatives and underwriters, and the Barge H & H 101, Barge H & H 139, Tug C. R. CLEMENTS, Barge CBC 192, and the SS J. E. DYER, their engines, tackle, appurtenances, owners, operators and underwriters and any and all other persons, firms, corporations or individuals who might be liable in any way arising out of or resulting from the death of my husband, Joseph Fontenot; and Vaughan Marine, Inc., or its underwriters are hereby authorized to sue for (in my name if necessary), collect and/or compromise any claims, interest, right or cause of action I may have or hereafter acquire against any of the aforesaid parties in any way arising out of the death of my husband, Joseph M. Fontenot.

I covenant and agree that I, Patricia Bergeron Fontenot, individually and as administratrix of the estate of Joseph M. Fontenot and as tutrix of the minor children, Mark Evans Fontenot and Philip Troy Fontenot, am the only party entitled to make claim or file suit against any party for the death of my husband, Joseph M. Fontenot, and I agree to hold harmless and fully indemnify any or all of "Released Parties" and any and all of their agents, officers and representatives whatsoever, from any suit, third party action or any other type of action for indemnity, contribution or payment by any party whatsoever, which may be instituted against the "Released Parties" or any of them on account of the death of my husband, Joseph M. Fontenot. I further covenant and agree that should any of "Released Parties" be impleaded

in any litigation wherein recovery is sought against released parties for the death of my husband on any theory whatever and should a judgment be rendered in favor of appearer against any party, including the parties against whom rights were specifically reserved and further should a judgment over be rendered against any of the "Released Parties" for the whole or any portion of such judgment, appearer agrees and covenants that she will not enforce collection of any portion of such judgment obtained by her, which, under the terms of the judgment, or any other judgment, could ultimately be recovered from any of the "Released Parties" or any of their agents, officers, employees or representatives whatsoever.

Appearer, in further consideration of the above payment, agrees that should any compromise settlement (whether performed by loan receipt or otherwise) be made between appearer and any other party, appearer will obtain a release from such other party in favor of all of "Released Parties" herein.

It is the intention of appearer that "Released Parties" shall be responsible for no further sums on account of the injury and subsequent death of Joseph M. Fontenot either to appearer or to any other person and should any of "Released Parties" be required to pay any sums whatever appearer covenants and agrees to hold harmless, fully reimburse and indemnify "Released Parties" or any of them for any expenditures of any kind and nature.

Only the consideration herein stated has been paid for this release and the covenants herein contained and it is understood and agreed that this payment is made in settlement of a disputed claim and by way of compromise agreement to avoid litigation and is not to be construed

as an admission of liability on the part of "Released Parties" herein, which liability in any event has been specifically denied.

I have fully informed myself of the contents and effects of this instrument and sign same as my own free act.

THUS DONE AND SIGNED on the day, month and year hereinabove written in the presence of the undersigned competent witnesses and me, said notary.

PATRICIA BERGERON FONTENOT
Patricia Bergeron Fontenot

WITNESSES:

DONALD J. FONTENOT

LeROY BORDELON

M. ALLEN LEE
Notary Public

SUPREME COURT, U. S.
FILED
DEC 4 1970
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

No. 827

HORTON & HORTON, INC.,
Petitioner,

v.

VAUGHAN MARINE, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

Supreme Court of the United States

OCTOBER TERM, 1970

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VAUGHAN MARINE, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Vaughan Marine, Inc. files this its Brief in Opposition to the Petition of Horton & Horton, Inc. for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and would respectfully show unto the Court as follows:

REPLY TO APPLICATION FOR WRIT OF CERTIORARI

FIRST COUNTER-POINT

The United States Court of Appeals for the Fifth Circuit did not err in affirming the District Court's holding that the capsizing of the barge H&H 101, damages occasioned to its hull, loss of its cargo and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the barge H&H

101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc. in equal proportions.

SECOND COUNTER-POINT

The United States Court of Appeals for the Fifth Circuit did not err in affirming the District Court's holding that since the capsizing of the barge H&H 101, damages occasioned to its hull, loss of its cargo, and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the barge H&H 101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc. in equal proportions, damages should be divided evenly between them.

ARGUMENT AND AUTHORITIES

FIRST COUNTER-POINT RESTATED

The United States Court of Appeals for the Fifth Circuit did not err in affirming the District Court's holding that the capsizing of the barge H&H 101, damages occasioned to its hull, loss of its cargo and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the barge H&H 101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc. in equal proportions.

From a reading of the Petition for Writ of Certiorari one may get the erroneous impression that the United States Court of Appeals specifically found that the doctrines of intervening cause and last clear chance are not applicable in admiralty. This is not the case at all. The opinion of the United States Court of Appeals for the Fifth Circuit actually held that the Trial Court's findings with regard to negligence, unseaworthiness and proximate cause were not clearly erroneous. The Court stated:

> "In his written opinion the District Judge has adequately set forth the facts which establish the basis of

his findings after having had the opportunity to hear and observe the witnesses, appraise their credibility, and weigh any conflicting inferences. Unless such findings are clearly erroneous they will not be overturned. *McAllister* v. *United States*, 348 U.S. 19, 75 S.Ct. 6 (1954); *Chaney* v. *City of Galveston*, 5 Cir., 1966, 368 F.2d 774; *Grigsby* v. *Coastal Marine Service of Texas, Inc.*, 5 Cir., 1969, 412 F.2d 1011. *Questions of negligence, unseaworthiness and proximate cause are to be determined by the trier of fact* and as such are subject to the clearly erroneous rule. *Southern Stevedoring & Contract Co.* v. *Hellenic Lines, Ltd.*, 5 Cir., 1968, 388 F.2d 267, 270; *M/V ENAK* v. *Monplaisir*, 5 Cir., 1968, 391 F.2d 277, 278; *E. D. Stephens* v. *Osaka Mercantile Steamship Company*, 5 Cir., 1964, 328 F.2d 604, 605. We are unable to say that the Court's findings and conclusions are erroneous. *To the contrary, we agree with them.*" (Emphasis added.)

Proximate cause, intervening cause and last clear chance present fact questions. In addition to the cases cited by the United States Court of Appeals for the Fifth Circuit see also *The Milwaukee and St. Paul Railway Company* v. *Kellogg*, 94 U.S. 469, 24 L.Ed. 256 (1877); *Hayes* v. *Michigan Central Railroad Company*, 111 U.S. 228, 28 L.Ed. 410, 4 S.Ct. 369, (1884).

Petitioner's First Point should be disposed of by the application of the "two-court" rule as enunciated in *Berenyi* v. *Immigration Service*, 385 U.S. 630, 17 L.Ed. 2d 656, 87 S.Ct. 666 (1967). The Court at 17 L.Ed. 2d 661 stated:

> "The petitioner asks us to reject as 'clearly erroneous' the factual conclusion about his Party membership reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' . . .

> The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force."

The Trial Court found that the negligence of Horton & Horton, Inc. and the unseaworthiness of the Barge H&H 101 contributed to cause the capsizing of the Barge H&H 101 and the death of Joseph Fontenot and that such negligence was "in equal proportions" to the negligence of Vaughan Marine, Inc. and the Tug CAVALIER. It is respectfully submitted that this fact issue has been found by "two courts" below and there is nothing in the record of this case to indicate that those findings were clearly erroneous.

SECOND COUNTER-POINT RESTATED

The United States Court of Appeals for the Fifth Circuit did not err in affirming the District Court's holding that since the capsizing of the barge H&H 101, damages occasioned to its hull, loss of its cargo, and the death of Joseph M. Fontenot were caused by the negligence of Horton & Horton, Inc. and the unseaworthiness of the barge H&H 101 and the negligence of the Tug CAVALIER and Vaughan Marine, Inc. in equal proportions, damages should be divided evenly between them.

Once again a reading of the Petition for Writ of Certiorari would indicate that the United States Court of Appeals for the Fifth Circuit as well as the United States District Court for the Southern District of Texas have overruled *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corporation*, 342 U.S. 282, 96 L.Ed. 318, 72 S.Ct. 277, 1952

A.M.C. 1 (1952). The result and holding of *Halcyon* (supra) is completely logical and correct and has not been disturbed by either of the courts below. It of course would be illogical to grant a ship repairer tort immunity in lieu of its obligation to its employees under the Longshoremen's and Harbor Workers' Compensation Act and revisit tort liability upon it by allowing a division of damages in a situation where one of its employees sued the ship upon which he was injured and the ship in turn impleaded the party to whom tort immunity had been granted by statute. All that the United States Court of Appeals for the Fifth Circuit has done is hold that Horton & Horton, Inc. was neither statutorily, nor by operation of law, immune from tort liability and consequently the *Halcyon* (supra) doctrine has no application in this case.

CONCLUSION AND PRAYER

In the event this Court is of the opinion that *Halcyon* (supra) bars contribution in this case, the Respondent respectfully submits that the Court should direct that the United States Court of Appeals for the Fifth Circuit's Opinion be modified to provide that Vaughan Marine, Inc. recover FORTY-FIVE THOUSAND AND NO/100 DOLLARS ($45,000.00), of and from Horton & Horton, Inc., since Horton & Horton, Inc. has actually received contribution from Vaughan Marine, Inc. for the damages arising out of the death of Joseph Fontenot.

Two courts have reviewed the evidence in this case and have found as a matter of fact that the negligence of Horton & Horton, Inc. and the unseaworthiness of the Barge H&H 101 were contributing proximate causes of the death of Joseph Fontenot and that the fault of Horton & Horton, Inc. had not come to rest or been superseded by the fault of Vaughan Marine, Inc. at the time of the casualty. The evidence in this case clearly supports these conclusions and they are certainly not clearly erroneous.

The United States Court of Appeals for the Fifth Circuit did not err in holding that *Halcyon* (supra) does not preclude contribution in this case.

WHEREFORE, Respondent prays that the United States Court of Appeals be in all things affirmed and that the Petition for Writ of Certiorari be denied, or in the alternative, in the event the Petition for Writ of Certiorari be granted, this case be remanded to the United States Court of Appeals for the Fifth Circuit with instructions to modify its Opinion to provide for a FORTY-FIVE THOUSAND AND NO/100 DOLLARS ($45,000.00) recovery by Vaughan Marine, Inc. against Horton & Horton, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the above Brief in Opposition to Petition for Writ of Certiorari were served upon Robert Eikel, Esq., Counsel for the Petitioner, by delivering same to his office at 205 Oil & Gas Building, Houston, Texas, the 3rd day of December, 1970.

THOMAS A. BROWN, JR.